

IN THE UNITED STATES DISTRICT  
COURT EASTERN DISTRICT OF  
WISCONSIN

The ESTATE OF SYLVILLE K. SMITH, by	)	
Personal Representative Mildred Haynes,	)	No. 17-cv-862
Patrick Smith, and Mildred Haynes, on her	)	
own behalf,	)	
	)	
Plaintiffs,	)	JURY TRIAL DEMANDED
	)	
v.	)	
	)	
CITY OF MILWAUKEE, WISCONSIN	)	
and DOMINIQUE HEAGGAN-BROWN,	)	
	)	
Defendants.	)	

## **EXHIBIT 40**

State v. D. Heaggan-Brown Opening Statements

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STATE OF WISCONSIN      CIRCUIT COURT      MILWAUKEE COUNTY  
BRANCH 30

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 2016-CF-005562

DOMINIQUE L. HEAGGAN-BROWN,

Defendant.

**JURY TRIAL (PM)**

**JUNE 13, 2017**

**HON. JEFFREY A. CONEN,**  
Circuit Court Judge,  
presiding.

LAURELL L. BRESLOW-COLLIEN, RPR  
Official Court Reporter

**CHARGE:**

Count 1: First-Degree Reckless Homicide

**A P P E A R A N C E S:**

JOHN T. CHISHOLM, District Attorney, and BENJAMIN LINDSAY, Assistant District Attorney, appeared on behalf of the State of Wisconsin.

STEVEN R. KOHN and JONATHAN C. SMITH, Attorneys at Law, appeared on behalf of the Defendant.

DOMINIQUE L. HEAGGAN-BROWN, Defendant, was present in custody.

ALSO PRESENT: J. Michael Damarco, Investigator

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1                                TRANSCRIPT OF PROCEEDINGS        (1:33 p.m.)

2                                THE CLERK:    Case No. 16-CF-5562, State  
3                                of Wisconsin vs. Dominique Heaggan-Brown,  
4                                first-degree reckless homicide.    Matter is here  
5                                for a jury trial.    Appearances.

6                                MR. CHISHOLM:    John Chisholm on behalf  
7                                of the State.    Assisting me is Assistant DA Ben  
8                                Lindsay.

9                                MR. SMITH:    Good afternoon, Your Honor.  
10                                Attorneys Jonathan Smith and Steven Kohn on behalf  
11                                of Mr. Heaggan-Brown who is present.

12                                THE COURT:    All right.    Good afternoon.  
13                                We're going to this afternoon start with the  
14                                preliminary instructions.    I've provided the  
15                                parties with the preliminary instructions that the  
16                                Court intends to give, which will be No. 50, which  
17                                is preliminary instruction on juror conduct,  
18                                evidence, 103; 148, objections of counsel; 55,  
19                                note taking permitted; 58, transcript not  
20                                available for deliberations; 59, police reports;  
21                                300, credibility of witnesses; 120, first-degree  
22                                reckless homicide with the 805 modified  
23                                instruction that we had talked about before  
24                                involving the self-defense issue and privilege  
25                                issue in this case; 140, burden of proof and

1 presumption of innocence; and 101, opening  
2 statements.

3 Any objection to those from the State?

4 MR. CHISHOLM: No, Your Honor.

5 THE COURT: And from the defense,  
6 subject to whatever objections you have made on  
7 the record at this point, are there any objections  
8 to anything else that I've mentioned subject to  
9 the objection with regard to 805?

10 MR. SMITH: No, sir.

11 THE COURT: All right. So the Court  
12 will start with the preliminary instructions, and  
13 we will then move along to the opening statements.  
14 We'll break for the evening. And for continuity  
15 sake, we'll start tomorrow morning at 9:00 and  
16 work our way all the way through with evidence all  
17 day tomorrow, and we should be on track, based on  
18 what I've been told, to finish up the State's case  
19 somewhere around middle of the day on Thursday, I  
20 hope.

21 Mr. Chisholm, somewhere around there?

22 MR. CHISHOLM: I believe so.

23 THE COURT: Give or take a little bit,  
24 and then the defense case can start either  
25 Thursday afternoon or Friday, and then we'll move

1           into Monday and Tuesday. So that's the hope right  
2           now, and we'll stay on track. We do have  
3           uninterrupted time. There is no other cases on  
4           the Court's calendar for the next week and a half  
5           so everything is dedicated to this case.

6                       Having said that, as soon as the jurors  
7           are available, we will bring them in.

8                       (An off-the-record discussion was held  
9           between the Court and the bailiff.)

10                      THE COURT: We are just waiting for the  
11           jury to get situated back there and get together  
12           and be brought out into the courtroom. After  
13           that, the jury will be sworn and then we'll start  
14           with the preliminary instructions.

15                      THE BAILIFF: All rise for the jury.

16                      (The jury entered the courtroom.)

17                      THE BAILIFF: You may be seated.

18                      THE COURT: Jurors remain standing for  
19           an oath.

20                      THE CLERK: Can you all raise your  
21           right hands?

22                      (The jury was sworn in.)

23                      THE COURT: All right. You may be  
24           seated. All right. Good afternoon, ladies and  
25           gentlemen. Hopefully everything went well in the

1 transition and we'll have further transition later  
2 this evening. We are down to 15 jurors. We have  
3 lost a juror. You are not to speculate as to the  
4 reason, but we are ready to proceed with the 15  
5 that we have so that there will be 12 and three  
6 alternates.

7 We are going to start with the  
8 preliminary instructions. Listen carefully to the  
9 preliminary instructions. Preliminary  
10 instructions are an overview of the law which you  
11 are to follow in eventually making your decision  
12 in this case. There are only a handful of the  
13 instructions that will eventually be given to you  
14 at the end of the trial. So they allow you to  
15 listen to the testimony and see the evidence in  
16 some framework or reference involving the law.

17 You do not have to memorize these  
18 instructions. At the end of the case, when we  
19 give you the final instructions, you'll be given a  
20 written copy of the final instructions to take  
21 with you in the jury room to use during your  
22 deliberations. So just listen carefully to the  
23 instructions. We will then follow up with  
24 additional -- with the argument -- I'm sorry,  
25 opening statements of the attorneys, and then we

1 will break for the evening and start up tomorrow  
2 morning at 9:00 and work through the evidence.

3 We are still on track to make it  
4 through my schedule as we've talked about  
5 beforehand. This is timed out pretty well so  
6 we're still working on keeping on track within the  
7 time schedule and the timeframe of this case.

8 Before the trial begins, there are  
9 certain instructions you should have to better  
10 understand your functions as a juror and how you  
11 should conduct yourself during the trial.

12 Your duty is to decide the case based  
13 only on the evidence presented and the law given  
14 to you by the Court. Anything that you may see or  
15 hear outside the courtroom is not evidence. Do  
16 not let any personal feelings about race,  
17 religion, national origin, sex, or age affect your  
18 consideration of the evidence.

19 Do not begin your deliberations and  
20 discussion of the case until all the evidence is  
21 presented and I have instructed you on the law.  
22 Do not discuss this case among yourselves or with  
23 anyone else until your final deliberations in the  
24 jury room.

25 We will stop or recess from time to



1 time during the trial. You may be excused from  
2 the courtroom when it is necessary for me to hear  
3 legal arguments from the lawyers. If you come in  
4 contact with the parties, lawyers, or witnesses,  
5 do not speak with them. For their part, the  
6 parties, lawyers, and witnesses will not contact  
7 or speak with the jurors. Do not listen to any  
8 conversation about this case.

9 Do not research any information that  
10 you personally think might be helpful to you in  
11 understanding the issues presented. Do not  
12 investigate this case on your own or visit the  
13 scene. Do not read any newspaper reports or  
14 listen to any news reports on radio or television  
15 about this trial. Do not consult dictionaries,  
16 computers, websites, or other reference materials  
17 for additional information. Do not seek  
18 information regarding the public records of any  
19 party or witness in this case. Any information  
20 you obtain outside the courtroom could be  
21 misleading, inaccurate, or incomplete. Relying on  
22 this information is unfair because the parties  
23 would not have the opportunity to refute, explain,  
24 or correct it.

25 Do not communicate with anyone about

1           this trial or your experience as a juror while you  
2           are serving on this jury. Do not use a computer,  
3           cell phone, or other electronic device with  
4           communication capabilities to share any  
5           information about this case. For example, do not  
6           communicate by blog, e-mail, text message,  
7           Twitter, or in any other way on or off the  
8           computer. Do not communicate with anyone --  
9           Strike that.

10                   Do not permit anyone to communicate  
11           with you, and if anyone does so despite you're  
12           telling them not to, you should report that to me.  
13           This case must be decided by you, the jurors,  
14           based on the evidence presented in the courtroom.  
15           People not serving on this jury have not heard the  
16           evidence, and it is improper for them to influence  
17           your deliberations and decision in this case.  
18           After this trial is completed, you are free to  
19           communicate with anyone in any manner.

20                   These rules are intended to assure that  
21           the jurors remain impartial throughout the trial.  
22           If any juror has reason to believe that another  
23           juror has violated these rules, you should report  
24           that to me. If jurors do not comply with these  
25           rules, it could result in a new trial involving

1 additional time and significant expense to the  
2 parties and taxpayers.

3 You are to decide the case solely on  
4 the evidence offered and received at trial.

5 Evidence is: First, the sworn  
6 testimony of witnesses, both on direct and  
7 cross-examination, regardless of who called the  
8 witnesses; second, the exhibits the Court has  
9 received, whether or not an exhibit goes to the  
10 jury room; and third, any facts to which the  
11 lawyers have agreed or stipulated or which the  
12 Court has directed you to find.

13 Attorneys for each side have the right  
14 and the duty to object to what they consider are  
15 improper questions asked of witnesses and to the  
16 admission of other evidence which they believe is  
17 not properly admissible. You should not draw any  
18 conclusion from the fact that an objection was  
19 made.

20 By allowing testimony or other evidence  
21 to be received over the objection of counsel, the  
22 Court is not indicating any opinion about the  
23 evidence. You jurors are the judges of the  
24 credibility of the witnesses and of the weight of  
25 the evidence.

1                   You are not required to but you may  
2                   take notes during this trial except during opening  
3                   statements and closing arguments. The Court will  
4                   provide you with materials.

5                   In taking notes, you must be careful  
6                   that it does not distract you from listening -- or  
7                   from carefully listening to and observing the  
8                   witnesses.

9                   You may rely on your notes to refresh  
10                  your memory -- or you may rely on your notes to  
11                  refresh your memory during the deliberations.  
12                  Otherwise, keep them confidential. After the  
13                  trial, the notes will be collected and destroyed.

14                  You will not have a copy of the written  
15                  transcript of the trial testimony available for  
16                  use during your deliberations. You should pay  
17                  careful attention to all the testimony because you  
18                  must rely primarily on your memory of the evidence  
19                  and the testimony introduced during the trial.

20                  During the course of the trial, the  
21                  attorneys may refer to or use police reports with  
22                  witnesses. Normally, these police reports will  
23                  not be provided to you. If you are not provided  
24                  with a police report, you should use your  
25                  collective memory regarding any reference to

1 police reports.

2 It is the duty of the jury to  
3 scrutinize and to weigh the testimony of the  
4 witnesses and to determine the effect of the  
5 evidence as a whole. You are the sole judges of  
6 the credibility, that is, the believability of the  
7 witnesses and of the weight to be given to their  
8 testimony.

9 In determining the credibility of each  
10 witness and the weight you give to the testimony  
11 of each witness, consider these factors: Whether  
12 the witness has an interest or lack of interest in  
13 the result of this trial; the witness's conduct,  
14 appearance, and demeanor on the witness stand; the  
15 clearness or lack of clearness of the witness's  
16 recollections; the opportunity the witness had for  
17 observing and for knowing the matters the witness  
18 testified about; the reasonableness of the  
19 witness's testimony; the apparent intelligence of  
20 the witness; bias or prejudice, if any has been  
21 shown; possible motives for falsifying testimony;  
22 and all other facts and circumstances during the  
23 trial which tend either to support or discredit  
24 the testimony. Then give to the testimony of each  
25 witness the weight you believe it should receive.

1                   There is no magic way for you to  
2                   evaluate the testimony; instead, you should use  
3                   your common sense and experience. In everyday  
4                   life, you determine for yourselves the reliability  
5                   of things people say to you. You must do the  
6                   same -- or you should do the same thing here.

7                   First-degree reckless homicide, as  
8                   defined in Section 940.02(1) of the Criminal Code  
9                   of Wisconsin, is committed by one who recklessly  
10                  causes the death of another human being under  
11                  circumstances that showed utter disregard for  
12                  human life.

13                  Before you may find the defendant  
14                  guilty of first-degree reckless homicide, the  
15                  State must prove by evidence which satisfies you  
16                  beyond a reasonable doubt that the following three  
17                  elements were present. First, that the defendant  
18                  caused the death of Sylville Smith. "Cause" means  
19                  the defendant's act was a substantial factor in  
20                  producing the death.

21                  Second, that the defendant caused the  
22                  death by criminally reckless conduct. "Criminally  
23                  reckless conduct" means the conduct created a risk  
24                  of death or great bodily harm to another person;  
25                  and the risk of death or great bodily harm was

1           unreasonable and substantial; and the defendant  
2           was aware that his conduct created the  
3           unreasonable and substantial risk of death or  
4           great bodily harm.

5                     Third, that the circumstances of the  
6           defendant's conduct showed utter disregard for  
7           human life.

8                     In determining whether the  
9           circumstances of the conduct showed utter  
10          disregard for human life, consider these factors:  
11          Whether -- what the witness -- strike that, what  
12          the defendant was doing; why the defendant was  
13          engaged in that conduct; how dangerous the conduct  
14          was; how obvious the danger was; whether the  
15          conduct showed any regard for life; and all other  
16          facts and circumstances relating to the conduct.

17                    Self-defense is an issue in this case.  
18          The law of self-defense allows the defendant to  
19          intentionally use force against another only if:  
20          The defendant believed that there was an actual or  
21          imminent unlawful interference with the  
22          defendant's person or the person of Officer Ndiva  
23          Malafa; and that the defendant believed that the  
24          amount of force the defendant used was necessary  
25          to prevent or terminate the interference; and the

1           defendant's beliefs were reasonable.

2                       The defendant may intentionally use  
3           force which is intended or likely to cause death  
4           or great bodily harm only if the defendant  
5           reasonably believed that the force used was  
6           necessary to prevent imminent death or great  
7           bodily harm to himself or Officer Malafa.

8                       A reasonable -- strike that. A belief  
9           may be reasonable even though mistaken. In  
10          determining whether the defendant's beliefs were  
11          reasonable, the standard is what an ordinary,  
12          prudent, and reasonably intelligent police officer  
13          would have believed in the defendant's position,  
14          having knowledge and training that the defendant  
15          possessed, and acting under the circumstances that  
16          existed at the time of the alleged offense.

17                      A "police officer" means any person  
18          employed by the City of Milwaukee for the purpose  
19          of detecting and preventing crime and enforcing  
20          laws or ordinances and who is authorized to make  
21          arrests for violations of laws or ordinances.

22                      The reasonableness of the defendant's  
23          beliefs must be determined from the standpoint of  
24          the defendant at the time of the defendant's acts  
25          and not from the viewpoint of the jury now.



1           The State must prove by evidence which  
2 satisfies you beyond a reasonable doubt that the  
3 defendant did not act lawfully in self-defense.

4           If you can -- strike that. If you are  
5 satisfied beyond a reasonable doubt that all three  
6 elements of first-degree reckless homicide have  
7 been proved and the defendant did not act lawfully  
8 in self-defense, you should find the defendant  
9 guilty.

10           If you are not so satisfied, you must  
11 find the defendant not guilty.

12           In reaching your verdict, examine the  
13 evidence with care and caution. Act with  
14 judgment, reason, and prudence.

15           Defendants are not required to prove  
16 their innocence. The law presumes every person  
17 charged with the commission of an offense to be  
18 innocent. This presumption requires a finding of  
19 not guilty unless in your deliberations you find  
20 it is overcome by evidence which satisfies you  
21 beyond a reasonable doubt that the defendant is  
22 guilty.

23           The burden of establishing every fact  
24 necessary to constitute guilt is upon the State.  
25 Before you can return a verdict of guilty, the

1 evidence must satisfy you beyond a reasonable  
2 doubt that the defendant is guilty.

3 If you can reconcile the evidence upon  
4 any reasonable hypothesis consistent with the  
5 defendant's innocence, you should do so and return  
6 a verdict of not guilty.

7 The term "reasonable doubt" means a  
8 doubt based upon reason and common sense. It is a  
9 doubt for which a reason can be given, arising  
10 from a fair and rational consideration of the  
11 evidence or lack of evidence. It means such a  
12 doubt as would cause a person of ordinary prudence  
13 to pause or to hesitate when called upon to act in  
14 the most important affairs of life.

15 A reasonable doubt is not a doubt which  
16 is based upon mere guesswork or speculation. A  
17 doubt which arises merely from sympathy or from  
18 fear to return a verdict of guilt is not a  
19 reasonable doubt. A reasonable doubt is not a  
20 doubt such as may be used to escape the  
21 responsibility of a decision.

22 While it is your duty to give the  
23 defendant the benefit of every reasonable doubt,  
24 you are not to search for doubt. You are to  
25 search for the truth.

1                   The lawyers will now make opening  
2                   statements. The purpose of an opening statement  
3                   is to give the lawyers an opportunity to tell you  
4                   what they expect the evidence will show so that  
5                   you will better understand the evidence as it is  
6                   introduced during the trial. I must caution you,  
7                   however, that opening statements are not evidence.

8                   Mr. Chisholm.

9                   MR. CHISHOLM: Thank you very much,  
10                  Your Honor, and thank you, ladies and gentlemen.  
11                  I'm going to take you back to August 13th of 2016.  
12                  On August 13 of 2016, Mr. Heaggan-Brown, while  
13                  working as a City of Milwaukee police officer,  
14                  shot Sylville Smith two times. He shot him twice.  
15                  The first shot went through his right bicep,  
16                  through-and-through; the second shot entered his  
17                  chest. That second shot killed Sylville Smith.

18                  Now, when I take you back to that time,  
19                  it's really important that you understand the  
20                  location, the orientation, and what was taking  
21                  place on August 13th. So if I take you back to  
22                  about 3:30 on August 13th, that's a Saturday.  
23                  It's in the summer, it's about 80 degrees that  
24                  day, you know, mostly cloudy but clear, and I'm  
25                  going to take you to the location of the 3200

1 block of North 44th Street. I'm going to show you  
2 a diagram because, again, it is important -- it's  
3 important --

4 MR. SMITH: Your Honor.

5 MR. CHISHOLM: -- that you get the  
6 opportunity.

7 THE COURT: Mr. Chisholm.

8 MR. SMITH: Can I just see?

9 MR. CHISHOLM: Oh, I'm sorry.

10 THE COURT: Are you able to see it as  
11 it's being pointed to?

12 MR. SMITH: No.

13 MR. CHISHOLM: Can I move it more  
14 towards you?

15 MR. SMITH: I'll move to this side of  
16 the table. Thank you.

17 MR. CHISHOLM: Can everyone still see  
18 that? It's really important in this case that you  
19 have an understanding of the context; the location  
20 that this was taking place.

21 So I'm taking you back now August 13th,  
22 2016. What you're looking at is a diagram. Now,  
23 this diagram is basically laid out so that you can  
24 see that this is north 44th Street going north and  
25 south.

1                   The location that we're talking about  
2                   is a gangway, the location between 3216-3218,  
3                   that's a duplex; and 3210-3212 North 44th Street,  
4                   another duplex. Almost this entire incident  
5                   occurred in a relatively small geographic area.  
6                   So it starts right on North 44th Street and it  
7                   ends about two or three houses north of -- north  
8                   of Auer, right in that location right there.

9                   Now, the reason I want you to be  
10                  oriented there, and I think it's sometimes helpful  
11                  just to be able to picture what's taken place.  
12                  You'll get an opportunity to see the evidence  
13                  itself. The most essential evidence you're going  
14                  to see is going to come from the police officers  
15                  themselves that were involved in this incident on  
16                  that day, and the form of that evidence is going  
17                  to come from body cameras. You're going to see  
18                  body cameras from Mr. Heaggan-Brown, you're going  
19                  to see a body camera from Officer Ndiva Malafa,  
20                  and there was a third officer involved in this as  
21                  well, Officer Voden. He did not have a body  
22                  camera that day.

23                  So when I take you back to that  
24                  location, I can tell you what the evidence will  
25                  show is that on that day right around 3:30, 3:35

1 in the afternoon, those three officers, Officer  
2 Heaggan-Brown, Officer Voden, and Officer Malafa,  
3 they were in two separate cars. Officer  
4 Heaggan-Brown was driving a Tahoe, SUV-type  
5 vehicle. He was by himself. In an unmarked  
6 police squad right behind him were officers Malafa  
7 and Voden. Officer Malafa is the driver. Officer  
8 Voden's the passenger. Officer Heaggan-Brown is  
9 the sole occupant of the SUV, but he's also the  
10 driver. Makes sense.

11 What happens is they're on routine  
12 patrol, and they decide to go into this area,  
13 right -- you want to picture it -- it's about a  
14 couple blocks northwest of Sherman Park, right in  
15 that area right there. They're in this location  
16 when they see a 2016 Ford Fusion black car that  
17 you see in this diagram right there. They later  
18 determine that that's Sylville Smith's car. With  
19 him at the time is a gentleman by the name of  
20 Demario Pritchard (phonetic).

21 What is described by the officers, and  
22 what the evidence shows, is that Officer  
23 Heaggan-Brown pulls his car up next to Sylville  
24 Smith, and Officer Malafa pulls his car up  
25 directly behind Sylville Smith's car. They

1 indicate that they're seeing activity that makes  
2 them suspicious. They observe that this vehicle  
3 is parked more than 12 inches from the curb.  
4 Because of that, they decide to conduct a stop.

5 At that point in time, it's important  
6 that you know that Officer Heaggan-Brown has  
7 positioned his car slightly to the north of  
8 Sylville Smith's car, and then Officer Malafa is  
9 directly behind him. This is where the body  
10 cameras kick in. This is where we start to  
11 capture the incident as it actually unfolded.

12 What you will observe from  
13 Mr. Heaggan-Brown's body camera is you will see  
14 him as he pulls up, you'll see him get out of his  
15 car, and you will see that he immediately pulls  
16 his gun out and points it in a westerly direction.

17 Now, when I give you these directions,  
18 again, getting oriented is sometimes really  
19 important. So just so you know, you're looking at  
20 me, you're looking to the west. This is to the  
21 north, this is to the east, and that's south. I'm  
22 telling you that just to orient you in the  
23 courtroom itself, but on this diagram you have to  
24 understand that this is north, this is east, and  
25 this is west, and this is south (indicating).

1                   What you'll see from Heaggan-Brown's  
2                   camera is that he gets out of his car and he goes  
3                   to the front of his squad car, and that's the  
4                   first time you're going to see him deploy his  
5                   weapon. In other words, you'll actually see him  
6                   pull the weapon out, and you'll see him pointing  
7                   it towards the east. At that point in time on his  
8                   camera, you're also going to see Officer Voden is  
9                   encountering the gentleman later determined to be  
10                  Mr. Pritchard who had been observed right next to  
11                  Mr. Smith's car. He's actually walked back toward  
12                  the sidewalk, and you'll see -- just for a brief  
13                  second you're going to see Officer Voden running  
14                  to approach Mr. Pritchard.

15                 At that point in time, you're going to  
16                 see Sylville Smith, who is at -- by this time he's  
17                 actually gotten out of his car and he starts  
18                 running to the north. He's running to the north,  
19                 and that's when he actually intersects with  
20                 Heaggan-Brown, right at that point in time. He  
21                 continues running to the north, he takes off  
22                 north; you will then see Officer Heaggan-Brown  
23                 starts in pursuit of Mr. Smith. Pursues him to  
24                 the north, at which time you can observe that  
25                 Mr. Sylville Smith takes a hard right to the east,



1           he goes into this gangway.

2                       Just so you know, we'll measure this  
3           out so you understand sort of the dynamics of what  
4           you're dealing with, the actual layout itself, but  
5           you're talking about 15 feet between the two  
6           houses here. Very standard layout in the city of  
7           Milwaukee duplex area, right?

8                       So you have a sidewalk. You'll learn  
9           from the evidence that there's actually a fence  
10          right across between these two houses right here;  
11          there's a chain link fence right here. What  
12          you're going to observe from Mr. Heaggan-Brown's  
13          body camera is that he begins in pursuit. So he  
14          actually puts his weapon back towards his holster.  
15          It's to hard determine whether he ever actually  
16          fully holsters it or not, but he puts it back  
17          towards his holster and he starts running to the  
18          north after Sylville Smith.

19                      The second piece of evidence that  
20          you're going to see is coming from Officer Malafa.  
21          Officer Malafa, his body camera also activates  
22          almost at the same time as he stops his car behind  
23          Sylville Smith's car. Now, it's important that  
24          you know that the way these body cameras work --  
25          and this is evidence that will come in as well --

1 is that they don't start recording until a button  
2 is pressed, but they constantly record, they just  
3 don't save it until the button is pressed.

4 And so what you will get -- and it  
5 automatically will back up about 30 seconds. So  
6 if an officer is engaged in something that they  
7 believe should be recorded, they can hit that and  
8 it backs it up 30 seconds. And so we'll explain  
9 that.

10 But what you're seeing from those video  
11 cameras, it really starts right from the moment  
12 Officer Malafa pulls up right here and Officer  
13 Heaggan-Brown is pulling up right there. You can  
14 see the initial seconds of the encounter right  
15 from that moment there.

16 Now, from Officer Malafa's perspective  
17 from his body camera -- and again, these are  
18 details that I will present through the evidence  
19 of witnesses we'll present for you -- but those  
20 body cameras, the recording unit is located right  
21 around the chest area. The actual camera is  
22 located up here on the right shoulder by the  
23 lapel. So that's the perspective that you're  
24 getting from that camera right there.

25 What you're going to observe from

1           Officer Malafa is he actually -- you can actually  
2           see Mr. Smith getting out of his car and starting  
3           to run north right there. Now, you also will see,  
4           in video footage, you will capture at the same  
5           time, there's an intersection between Officer  
6           Heaggan-Brown and Officer Malafa, so you can  
7           actually see Officer Heaggan-Brown as he's  
8           pointing his weapon at -- in the easterly  
9           direction as Sylville Smith is running to the  
10          north. You're going to actually be able to see  
11          that.

12                   Officer Malafa follows right behind  
13          Officer Heaggan-Brown. So what now you have,  
14          you're going to have two body cameras that are  
15          essentially capturing the same event in roughly  
16          the same time, basically taking place at the same  
17          moment. You're going to see Officer Heaggan-Brown  
18          is the first one in pursuit directly behind  
19          Sylville Smith, and then you have Officer Malafa  
20          right behind him.

21                   Now, what you're going to see depicted  
22          is Sylville Smith, as he runs, he starts taking a  
23          hard right towards the east; you're going to see  
24          his hands go into the air, and you're going to see  
25          him basically wipe out. He wipes out right here,

1 right before this fence, right on the sidewalk.

2 He has a pistol. In fact, Officer  
3 Malafa has actually seen that pistol from the  
4 minute he started getting out of his car. Officer  
5 Malafa will testify that he saw the pistol, and he  
6 was on his radio calling that out. So as Officer  
7 Malafa is chasing Mr. Smith, he's aware that he  
8 has a pistol.

9 Officer Heaggan-Brown is not initially  
10 aware that he's got the pistol. He becomes aware  
11 of that after he's taking the curve after  
12 Mr. Smith has already fallen to the ground, and  
13 what you'll see on the video footage is that the  
14 gun actually comes out of Sylville Smith's hand.  
15 As he wipes out, he goes on the ground; that gun  
16 hits the ground.

17 These are now the critical moments.  
18 These are absolutely the critical moments. At  
19 this moment what you will capture on -- to some  
20 extent on both cameras, but certainly with  
21 Mr. Heaggan-Brown's, is you will see Sylville  
22 Smith holding onto that fence, just as I am if  
23 this were the fence right here, if I'm facing east  
24 holding onto that fence, reaching back for the  
25 firearm, reaching back for the firearm at that

1 point in time.

2 Mr. Heaggan-Brown at first looks like  
3 he might be going for his taser, and then he  
4 switches back to his gun and he draws his gun out  
5 at that point in time. When he sees Mr. Smith  
6 with his hand towards the ground and start lifting  
7 up, at that moment in time you can see an actual  
8 discharge from Officer Heaggan-Brown's firearm.

9 That's the first shot. That is the  
10 first shot, and we later determine that that's the  
11 shot that goes through Mr. Smith's bicep. It's a  
12 through-and-through wound. You'll hear testimony  
13 from the medical examiner that's not a fatal  
14 wound. It's a through-and-through shot at that  
15 point in time.

16 What you will then be able to determine  
17 from that body camera footage is a reasonable  
18 interpretation of what Mr. Smith was doing. A  
19 reasonable interpretation of what Mr. Smith was  
20 doing. What was he doing? He was throwing the  
21 gun over the fence. That's what the evidence is  
22 going to show, is he's picking that up, he's going  
23 to throw it over the fence; and, in fact, he  
24 disarms himself by throwing the gun about 30 feet  
25 over the fence.

1                   He then immediately, after having been  
2                   shot in the arm -- and keep in mind, nobody -- I  
3                   hope nobody's ever had the experience of being  
4                   shot. But the testimony will come in here as well  
5                   is these aren't just ordinary weapons that are  
6                   used, and most importantly it's not ordinary  
7                   ammunition that's used by the police.

8                   The ammunition that's used by the  
9                   police is designed to do one thing and one thing  
10                  only and that is to stop you. It's not like in  
11                  the military. In the military, they're required  
12                  by the Geneva Convention -- I won't get into that.

13                  The bottom line, what the evidence is  
14                  going to show is that the firearms and the bullets  
15                  that are used by the Milwaukee Police Department  
16                  and all law enforcement agencies are designed to  
17                  do one thing, and that's to stop, and that's how  
18                  they're designed.

19                  That first round strikes Sylville Smith  
20                  as he's throwing that gun over the fence, and at  
21                  that point in time you'll see on the body camera  
22                  Sylville Smith goes to the ground. As he's going  
23                  to the ground, he hits the ground fully; he  
24                  actually falls on his back, his feet come up, and  
25                  his hands are then up by his head, a full 1.69

1           seconds after the first shot.

2                       You can actually see Officer  
3           Heaggan-Brown tracking -- tracking Sylville Smith  
4           down to the ground, and then when you switch over  
5           to Malafa's view, which will be the better one,  
6           you will actually see Heaggan-Brown standing  
7           directly over Sylville Smith about two feet away  
8           and 1.67 seconds after -- 69 seconds after the  
9           first shot, you're going to see the second shot.  
10          You're going to see that second shot when Sylville  
11          Smith is on the ground, unarmed with his hands up  
12          by his head with no place to go. He's basically  
13          in this corner right here. He's going to have --  
14          he's going to have a brick wall to the north; he's  
15          got a fence to the east, he's got two police  
16          officers within feet of him at the time he's shot.

17                      That second shot, the evidence is going  
18          to show, is from essentially within feet, point  
19          blank range it strikes him directly in the chest  
20          while he's laying on the ground, enters his body,  
21          damages his lungs, damages his heart, and  
22          ultimately ends up in his lower back. That is the  
23          fatal wound 1.69 seconds after he was shot in the  
24          arm and had thrown the gun over the fence.

25                      We're going to continue to hear some of

1 the evidence both from those body cameras and then  
2 certainly from witnesses because the State has an  
3 obligation to investigate these cases very  
4 closely. The investigative agency in this case,  
5 the majority of the witnesses you're going to hear  
6 from come from the Wisconsin Department of Justice  
7 and the Division of Criminal Investigation. Why  
8 is that? Wisconsin laws require that an  
9 independent agency conduct police-related  
10 shootings. Why is it? It's a measure of  
11 accountability. It's a measure of independence.

12 We want somebody to come in that is not  
13 from the same department to conduct this  
14 investigation so they just get the facts. They  
15 get the facts, and they allow those facts to be  
16 presented in an objective way. And that's what  
17 you're going to hear from these witnesses, is just  
18 the objective facts. They're going to tell you  
19 what they saw, what they recovered.

20 The short outline of that, I anticipate  
21 starting early tomorrow morning, we'll start with  
22 what I will call a scene officer, that's Special  
23 Agent Martinez; he was the person responsible for  
24 actually collecting all the evidence on the scene.

25 After that I anticipate you're going to



1           hear from Officer Malafa himself, and after that  
2           you're going to have a series of witnesses; some  
3           of the witnesses will tell you what kind of  
4           evidence they collected, how they collected it,  
5           what was done with that evidence.

6                       Eventually you're going to also hear  
7           then from Special Agent Raymond Gibbs, and he's an  
8           essential witness as well. Why? Why is he the  
9           essential witness? Well, what I've just  
10          described: First shot, second shot. You're  
11          saying to yourself, 1.69 seconds, boy, it seems  
12          like a short time. Here's what the law requires:  
13          The law requires that you only use force when  
14          you're faced with an imminent threat of death or  
15          great bodily harm. That's what the law requires,  
16          right?

17                      So when we're looking at this, we have  
18          to assess that decision to fire that second round.  
19          That is ultimately what this case comes down to:  
20          Was that second round a justified, appropriate,  
21          privileged, self-defensive shot? Was it  
22          reasonable for a person to have believed that they  
23          faced death or great bodily harm under those  
24          circumstances? That's the case.

25                      And why I talked about Special Agent

1 Ray Gibbs, because we talked to Mr. Heaggan-Brown;  
2 he was given an opportunity to explain why he did  
3 what he did. And let's make it perfectly clear:  
4 Officer Heaggan-Brown is not being charged for  
5 that first shot, even though objectively --  
6 objectively you can make a reasonable  
7 interpretation that the only purpose that  
8 Mr. Smith was reaching for that gun was to throw  
9 it away, that's not the standard that we apply.

10 The standard we apply is would it be  
11 reasonable for any person, but certainly would it  
12 be reasonable for a police officer with his  
13 training and experience, his understanding, his  
14 knowledge of the law and past experience to  
15 believe that under those circumstances he may have  
16 been confronted in a split second with a risk of  
17 death or great bodily harm to him or his partner.  
18 He's not being charged with that.

19 What he is being charged with is based  
20 on both his actions and his statement. His  
21 statement is made on August 15th, two days after  
22 the shooting. He's had an opportunity to reflect  
23 on this, to think about it. It's not like he was  
24 just pulled in right away and ordered to make a  
25 statement or anything like that.

1                   He was given an opportunity to think  
2                   about it. He was able to consult, and then he sat  
3                   down with the agents and gave a statement. What  
4                   his statement does is it basically gives that same  
5                   version of events up to the first shot. Up to  
6                   that first shot it's essentially the same thing.

7                   What about the second shot? How does  
8                   he explain the second shot? Well, what he says is  
9                   that after the first shot was fired he sees that  
10                  Mr. Smith had thrown the gun away. He tossed it.  
11                  You're going to hear him say in the video four or  
12                  five times shortly after that he tossed it, he  
13                  tossed it. So he had the knowledge at that point  
14                  in time that Sylville Smith was no longer armed.

15                  He goes to the ground, and what does he  
16                  give as the reason for shooting him the second  
17                  time? He said that he thinks his hands were going  
18                  to his waist and that he might have a second gun,  
19                  that he would then draw that second gun and  
20                  possibly use that to shoot him or Officer Malafa.

21                  That statement the State will provide  
22                  evidence is not reasonable with all the facts and  
23                  circumstances in this case that a person doesn't  
24                  throw a gun -- because the particular gun that  
25                  Mr. Smith had was a Glock 20 -- Glock 22. It had

1 an extended magazine. Why would a person throw a  
2 gun away only to reach for another one?

3 The evidence is going to show that that  
4 wasn't the reason because from the videotapes of  
5 the officers' body cameras themselves, Sylville  
6 Smith doesn't go for his waistband. In fact, he  
7 doesn't go -- I take that back, he does go for his  
8 waistband, but he doesn't go for his waistband  
9 until about nine seconds after he's been shot the  
10 second time. The first time he goes for his  
11 waistband is about nine seconds after he's been  
12 shot the second time. And what does Officer  
13 Heaggan-Brown do? He actually walks up to him and  
14 pushes his hand away.

15 So if he reasonably believes that  
16 Sylville Smith is armed at that time, well,  
17 according to his statement he should have feared  
18 for his safety and he should have shot him then,  
19 but that's not what happened.

20 What happens is Sylville Smith goes to  
21 the ground, hands go up by his head, Heaggan-Brown  
22 stands right over him and he shoots him at point  
23 blank range when he doesn't have the gun in his  
24 hands. That's what the evidence is going to show  
25 you.

1                   My obligation is to look at that  
2                   evidence; your obligation is to look at that  
3                   evidence and determine whether or not a crime has  
4                   occurred.

5                   Now, if I can, I'm just going to  
6                   briefly -- and I'll finish -- just run through the  
7                   elements of this offense, first-degree reckless  
8                   homicide. First-degree reckless homicide, it has  
9                   three elements. We try to break it into chunks,  
10                  and the State has to prove each one of those  
11                  chunks beyond a reasonable doubt.

12                  So there's three elements that the  
13                  Court has already instructed you and will instruct  
14                  again. When it comes to first-degree reckless  
15                  homicide, I call it the three Cs. It's an easy  
16                  way to remember. The three Cs are simply this:  
17                  You have to show the defendant caused -- he caused  
18                  the death of Sylville Smith. Then we have to look  
19                  at the conduct, that's the second C. The conduct  
20                  created a risk of death or great bodily harm to  
21                  another person, the risk of death or great bodily  
22                  harm was unreasonable and substantial, and the  
23                  defendant was aware that his conduct created the  
24                  unreasonable and substantial risk of death or  
25                  great bodily harm. And finally, care. Three Cs.

1           We'll say cause, conduct, and care.

2                       What were his actions before and after  
3           that tell you as a jury in determining whether or  
4           not the circumstances of the conduct showed utter  
5           disregard for human life?

6                       The State will present evidence that  
7           any time you shoot an unarmed man on the ground  
8           right in the chest causing his death, you're  
9           showing utter disregard for that person's life.

10                      Some of this will be difficult --  
11           difficult things to see. You're also going to see  
12           that Sylville Smith was still breathing a full  
13           minute, minute and a half after that shooting.  
14           CPR didn't begin on Sylville Smith until a minute  
15           and a half -- roughly over a minute after he was  
16           shot in the chest. Those are things that you can  
17           consider when looking at whether there was also  
18           conduct consistent with utter disregard for life.

19                      Now, we understand -- we understand  
20           that this is going to be a self-defense case. We  
21           embrace that, we acknowledge it, and we have to  
22           look at the issue of self-defense.

23                      The issue always comes down to  
24           reasonableness. Anyone, any citizen, anybody is  
25           entitled to defend themselves. If you're at risk

1           for death or great bodily harm, you are entitled  
2           to defend yourself, but it has to be -- it has to  
3           be a reasonable and substantial threat. And under  
4           these circumstances, the State believes will show  
5           evidence that will show that just didn't exist at  
6           the time. I have to demonstrate that the  
7           defendant believed that there was an actual or  
8           imminent unlawful interference with the  
9           defendant's person or the person of Officer  
10          Malafa.

11                   First shot, yes. In fact, we'll break  
12          them -- we'll break them both down. As we go  
13          forward, we'll break them both down. The facts  
14          support that in the first shot, yes. The  
15          defendant believed that the amount of force the  
16          defendant used was necessary to prevent or  
17          terminate the interference. The evidence is not  
18          going to support that. Mr. Heaggan-Brown's own  
19          statement does not support that. The defendant's  
20          belief --

21                   MR. SMITH: Objection. Argumentative.

22                   THE COURT: Rephrase the statement, or  
23          opening statement.

24                   MR. CHISHOLM: Sure. I anticipate the  
25          evidence is going to show you that that does not

1 support that, the evidence doesn't support that.  
2 And that the defendant's beliefs were reasonable.  
3 Again, we'll look directly to the defendant's own  
4 statement to answer that question.

5 The defendant may intentionally use  
6 force which is intended or likely to cause death  
7 or great bodily harm, only if the defendant  
8 reasonably believed that the force used was  
9 necessary to prevent imminent death or great  
10 bodily harm to himself. We're going to break it  
11 down.

12 We're going to look at both the first  
13 shot and second shot, and at the conclusion of all  
14 of this evidence, I am confident that you will  
15 have sufficient evidence to find Mr. Heaggan-Brown  
16 guilty of the offense of first-degree reckless  
17 homicide. Thank you very much.

18 THE COURT: Thank you.

19 Mr. Smith.

20 MR. SMITH: Thank you, Your Honor.

21 Mr. Chisholm, good afternoon, ladies  
22 and gentlemen of the jury. This is one of two  
23 times that we get to address you directly.  
24 Certainly very appreciative of your time.  
25 Everyone has thanked you, and we continue to do



1           so. Mr. Heaggan-Brown is appreciative. This is  
2           really an important part of the process. The jury  
3           system's really sort of the cornerstone of our  
4           criminal justice system, so again, we thank you  
5           for your time.

6                       There are many things that Mr. Chisholm  
7           has said that the evidence is going to show that I  
8           don't disagree with. There are some very  
9           fundamental disagreements, however, as well. The  
10          scene diagram, as he has laid it out, I don't  
11          disagree that that's how the evidence is going to  
12          show.

13                      The scene is what it is; it's the  
14          scene. But ultimately we believe that the  
15          evidence is going to show that Dominique  
16          Heaggan-Brown is not guilty of first-degree  
17          reckless homicide.

18                      The judge has told you that opening  
19          statements are not evidence, and indeed, they are  
20          not. And they aren't argument. Opening  
21          statements are just that; it's a statement. We  
22          sometimes refer to it as a road map; what do we  
23          think that the evidence is going to show you. Of  
24          course, until we hear the evidence, no one knows  
25          for certain, but this is what we believe the

1 evidence is going to show.

2 And it is an opportunity, as the judge  
3 has indicated, to alert you to some matters. So  
4 as you're listening to testimony and observing  
5 evidence, there are some things that you may wish  
6 to -- well, I know you wish to pay attention to  
7 all of it, but just so you are aware of what is  
8 forthcoming.

9 This case is not to be decided on  
10 sympathy. The judge has told you that. It's to  
11 be decided on the law; that is proof beyond a  
12 reasonable doubt. That is why we're here. It's  
13 Mr. Chisholm's burden to do so.

14 And what we believe the evidence is  
15 going to show is, indeed, on August the 13th,  
16 Dominique Heaggan-Brown, Mr. Heaggan-Brown had  
17 been a City of Milwaukee police officer for  
18 approximately three years, a little over three  
19 years. He had previously attended the police  
20 academy where he received training in the  
21 investigative process, the law, police procedures,  
22 tactics, and significantly, the use of force  
23 including the use of deadly force. And he used  
24 that police training, the evidence will show,  
25 during those -- and his experience during those

1 three-plus years, he used that on August the 13th  
2 of 2016.

3 Organizationaly, the City of Milwaukee  
4 is broken into seven police districts, okay, and  
5 Mr. Heaggan-Brown was assigned to the 7th  
6 district. The 7th district includes an area  
7 called the Sherman Park neighborhood, Sherman Park  
8 area. Without question, as with a good portion of  
9 the city, there are a number of fine, decent,  
10 great-quality people who live in that area. But  
11 the evidence will show that area, as other areas  
12 of the city, also known to be what they call a  
13 high-crime area, be it drug trafficking, guns,  
14 other criminal activity, is known as a high-crime  
15 area.

16 On August 13th of last year,  
17 Mr. Heaggan-Brown's normal shift, the shift that  
18 he would normally work, would be 4 p.m. to  
19 midnight; however, there was an initiative by the  
20 department to show a greater police presence in  
21 the area, sort of a show of force, what have you,  
22 in this area, and Mr. Heaggan-Brown worked some  
23 overtime.

24 As a matter of fact, I believe Officers  
25 Malafa and Voden were similarly situated, normally

1           4 to midnight, agreed to work some overtime.

2                   This overtime took place prior to the  
3           normal shift. It began at 2:00. The evidence  
4           will show Mr. Heaggan-Brown was normally assigned  
5           to the bicycle patrol during warmer weather and  
6           that he would patrol that area and many areas, but  
7           he was familiar with that neighborhood area.

8                   They begin their patrol.

9           Mr. Heaggan-Brown is in his own vehicle or a  
10          vehicle assigned to him. Officers Voden and  
11          Malafa are in a separate vehicle; that during the  
12          course of those two hours they have some  
13          interaction with members of the public, and  
14          they're really working their way back towards the  
15          station because they are to begin their normal,  
16          regular shift. That overtime period is coming to  
17          a close.

18                  A decision is made to go through a  
19          certain area, and when they do so, they observe a  
20          vehicle with out-of-state plates parked more than  
21          12 inches from the curb.

22                  You will learn, and the evidence will  
23          show you, that it is known to these officers and  
24          officers that it is not uncommon for individuals  
25          engaged in the trafficking of narcotics to use

1 newer vehicles, out-of-state plates in their  
2 pursuits. And also you'll learn parking more than  
3 12 inches from the curb is an ordinance violation  
4 within the City of Milwaukee.

5 And such an infraction, in addition to  
6 other matters, but this infraction is something  
7 that law enforcement will use in order to engage  
8 or have interaction with individuals,  
9 particularly, if they want to conduct what we call  
10 a legal investigatory stop. And that's what was  
11 happening here.

12 Mr. Heaggan-Brown, Officers Malafa and  
13 Voden were conducting an investigatory stop, based  
14 upon their training and experience because of this  
15 vehicle, because of the out-of-state plates,  
16 because it was parked more than 12 inches from the  
17 curb, and because there was a person on the  
18 passenger side of said vehicle sort of leaning in  
19 or towards the vehicle as though some type of  
20 transaction took place. That's why they are  
21 trying to conduct this stop.

22 As soon as this investigatory stop  
23 begins, before Mr. Heaggan-Brown can even exit his  
24 vehicle, a man, later identified as Sylville  
25 Smith, begins running. Sylville Smith was not

1 known to Dominique Heaggan-Brown. But he starts  
2 running, and when he runs, he has a gun in his  
3 hand. It's a gun with an extended clip or  
4 magazine. You'll hear testimony about that. And  
5 Officer Malafa advises he's got a gun.

6 Mr. Heaggan-Brown, Mr. Malafa, they  
7 give chase. Mr. Heaggan-Brown is ahead of Officer  
8 Malafa but trailing behind Mr. Smith. During that  
9 pursuit, Mr. Smith is being commanded by law  
10 enforcement, "Drop the gun, drop the gun," but he  
11 does not. He turns the corner, as this was talked  
12 about the evidence is going to show, and the body  
13 camera footage that has been referenced will show  
14 what appears as that Smith, while holding this  
15 weapon, either slips or runs into the fence or  
16 attempts to jump the fence or what have you, but  
17 he drops the gun.

18 The evidence will show he's still being  
19 commanded, "Drop the gun." Instead, Mr. Smith  
20 picks up that weapon, turns towards Officer  
21 Heaggan-Brown and Officer Malafa. First shot,  
22 through the right bicep, it's a  
23 through-and-through.

24 When the shot hits his arm, we believe  
25 the evidence will show it either causes him to

1           lose control of the gun or it is thrown over the  
2           fence by Smith. We believe the evidence in the  
3           video will show that he attempts to scale that  
4           fence, and as doing so, he falls backwards onto  
5           his back with his whole body going back, his  
6           hands, feet coming back, and then coming forward.

7           The video will show that it's not only  
8           his feet coming forward. It will show that his  
9           hands are coming forward, and it's at that time  
10          that the second shot is fired, the shot that hits  
11          him in the chest.

12          With his hands going forward fearing  
13          that he still may have had access to the first  
14          gun, fearing that he may be reaching for another  
15          gun, fearing for his safety and the safety of  
16          Officer Malafa, he fires that second shot. The  
17          time as is mentioned between that first and second  
18          shot is less than two seconds, 1.7, 1.69 seconds.  
19          These are literally split-second decisions that  
20          Dominique Heaggan-Brown is making and making under  
21          fast-moving circumstances.

22          You will also see on the video that  
23          even after that second shot is fired, Smith is  
24          being commanded, "Stop reaching, stop reaching,  
25          get your hands away." The weapons still trained

1 on him, still pointed at him when that is being  
2 said. The evidence will show that he's saying  
3 this because he believed that Smith could have  
4 access to that first weapon or, with the reaching,  
5 the second weapon at the waistband.

6 At some point while this is going on or  
7 as he falls, a swarm of bees are stirred up. At  
8 some point during this process, Officer  
9 Heaggan-Brown is stung by a bee, though at that  
10 time he doesn't know if he's stung by a bee or if  
11 it's something else; gunpowder residue, what have  
12 you, something else, but he feels this burning  
13 sensation, and you're going to hear all of this in  
14 the tape.

15 But he and Officer Malafa pull  
16 Mr. Smith away from where these bees are, and  
17 Dominique Heaggan-Brown begins to perform chest  
18 compressions on Mr. Smith, albeit a very short  
19 time; he seems to come in contact with blood and  
20 there's a question of whether he should have  
21 gloves and whatnot. Ultimately another officer  
22 takes over, and notwithstanding those efforts,  
23 Mr. Smith dies.

24 Pursuant to protocol, Mr. Heaggan-Brown  
25 is sort of removed of the investigative scene



1           here. He's still on scene. You're going to  
2           hear -- what I think you will hear is the  
3           conclusion of the body cam footage and stuff, but  
4           you'll understand, the evidence will show, that  
5           he's sort of removed because he is the officer  
6           that is involved in the shooting pursuant to  
7           protocol, just as with the outside agency  
8           investigating this matter. There's certain  
9           protocol that is followed when there's an  
10          officer-involved shooting.

11                   A couple days later -- well, the  
12          evidence is going to show that the body cam  
13          footage from Officer Malafa and Officer  
14          Heaggan-Brown is taken pursuant to these  
15          protocols, and the evidence will be that a few  
16          days later, Mr. Heaggan-Brown, without having seen  
17          his body cam video, without having seen Officer  
18          Malafa's body cam video, voluntarily provides a  
19          statement to the investigators.

20                   And in that statement you will see,  
21          when you are advised of the statement with respect  
22          to the video, that he describes really in great  
23          detail and confirms what it is that you are going  
24          to see on that video. And in that statement he  
25          does say that he was concerned, that he feared for

1 his safety, that Mr. Smith, Sylville Smith was  
2 reaching for a weapon, and he feared for his  
3 safety and the safety of Officer Malafa.

4 You are also going to hear testimony  
5 from a gentleman by the name of Robert Willis.  
6 Mr. Willis is a former law enforcement officer  
7 himself. He's also had a career in training  
8 current and future police officers in amongst, you  
9 know, many things; defense and arrest tactics, use  
10 of deadly force. He's trained them all over the  
11 State of Wisconsin, and, in fact, has authored a  
12 training manual, one of the authors of a training  
13 manual that is employed by the various departments  
14 throughout the State of Wisconsin in order to  
15 instruct individuals, future police officers on  
16 these matters.

17 And Mr. Willis is going to provide  
18 testimony about weapons, the law in terms of  
19 police interaction with individuals, the training  
20 that police officers receive. He has seen the  
21 body camera footage, and, in fact, he has broken  
22 it down essentially frame by frame into what is  
23 about 131, 130 -- 132 of a second. He's going to  
24 discuss the police training regarding the use of  
25 force, including deadly force, and when and under

1           what circumstances it can be used.

2                       Mr. Willis will further talk about what  
3           he terms -- the nature of what he terms "a gun  
4           fight," more specifically, when is gun fight  
5           begins and when it is that it ends. He will tell  
6           you that police officers are trained with what's  
7           called the plus-one rule. They are trained that  
8           where a suspect has one weapon they should believe  
9           that there is another weapon present. The weapon  
10          they see, plus one additional weapon. And he will  
11          tell you that gun fight ends when the threat has  
12          been stopped. And a threat isn't just a weapon  
13          that is seen, but a number of facts and  
14          circumstances concerning the entire situation and  
15          the suspect's behavior.

16                      You have promised to listen to all of  
17          the evidence, and I, again, ask you and remind you  
18          to do so. You should do that, that is your job.  
19          But about that video, I mentioned that it's been  
20          broken down sort of frame by frame, both by  
21          Mr. Willis and certainly by the prosecution here.  
22          Those frames can be paused and stopped on any  
23          particular frame, but that isn't how these events  
24          unfold. We are looking at them and you will be  
25          looking at them in hindsight, but they unfolded in

1 real time.

2 The whole chase from the time  
3 Mr. Heaggan-Brown gets out of his vehicle to the  
4 time of the second shot being fired, that whole  
5 chase, that whole sequence, 12 seconds or less.  
6 And the time between that first shot and second  
7 shot, 1.69, 1.7 seconds. That's the real time in  
8 which this unfolded.

9 That, ladies and gentlemen, is what we  
10 believe the evidence is going to show in this  
11 matter. The evidence is going to show that  
12 Mr. Heaggan-Brown was doing his job on August  
13 the 13th, 2016, and that when he fired two shots  
14 at Sylville Smith, that he did so fearing for his  
15 safety and fearing for the safety of Officer  
16 Malafa. And based upon that and upon and under  
17 the law, we believe Mr. Heaggan-Brown is not  
18 guilty of this offense, and that is the verdict at  
19 the end of this case that we will ask you to  
20 return. Thank you.

21 THE COURT: Thank you, Mr. Smith.  
22  
23  
24  
25

1 All right. We are going to break for  
2 the evening. You have your schedules, and the  
3 deputies who are going to be with you will be  
4 giving you your schedules and taking care of you  
5 this evening and into tomorrow morning. We will  
6 resume tomorrow at 9:00 a.m. with the beginning of  
7 the evidence and work through the evidence all day  
8 tomorrow and then through the rest of the week.

9 I don't have to remind you what not to  
10 do, I've already told you. Plus, the officers and  
11 the deputies that will be with you will be  
12 reminding you as to what you can and cannot do.  
13 Enjoy your evening, and we'll see everyone  
14 tomorrow morning at 9 a.m.

15 THE BAILIFF: All rise for the jury.

16 (The jury left the courtroom.)

17 THE BAILIFF: You may be seated.

18 THE COURT: All right. We have a  
19 handful of housekeeping matters to take care of so  
20 why don't we do that right now so that we don't  
21 forget. So let's start with the strikes for cause  
22 that we had decided in chambers, and it was --  
23 it's my understanding that all of the strikes for  
24 cause that we -- that the Court granted were  
25 stipulated to. I'm not going to go through the

1 strikes for cause through the entire list; it will  
2 only be Jurors 1 through 39 that were in the  
3 selection process. So that would be Jurors No. 8,  
4 10, 11, 12, 15, 16, 18, 19, 23, 26, 32, 35, 37.  
5 Is that correct?

6 MR. LINDSAY: Yes, Your Honor.

7 THE COURT: Is that correct, Mr. Smith?

8 MR. SMITH: It is.

9 THE COURT: All right. Also, we lost a  
10 juror. We're not going to discuss all the  
11 specifics right now, but suffice it to say that  
12 Juror No. 36 is no longer going to be with us as  
13 far as this trial is concerned. The Court will  
14 take the issues on that up later on. It was the  
15 decision both of the Court, as well as the  
16 attorneys, that we were to continue on without  
17 that juror.

18 Is that correct, Mr. Lindsay or  
19 Mr. Chisholm, whoever wants to speak?

20 MR. LINDSAY: Yes, Your Honor, that's  
21 correct.

22 THE COURT: Mr. Smith?

23 MR. SMITH: It is.

24 THE COURT: All right. And the Court  
25 will take that up either later this week or next

1 week sometime when we have the time to actually  
2 deal with it. Is there any other record we need  
3 to make?

4 MR. LINDSAY: There was a defense  
5 motion in chambers.

6 THE COURT: Oh, that's correct. Do you  
7 want to put that on the record briefly?

8 MR. SMITH: Your Honor, during the  
9 close of my voir dire, and it was sort of the  
10 discussion previously about what I would call the  
11 catchall question -- I'm sorry, Madam Reporter.  
12 Can I have the microphone? Sort of a catchall  
13 question about is there anything that anyone  
14 believed that they should volunteer, actually, I  
15 think it was in response to a question of any  
16 answer somebody would change is really what I  
17 think it was. At that time Juror No. 18 had  
18 indicated that in his questionnaire he filled out  
19 one answer but subsequent to that point in time he  
20 came to realize that he was aware of other cases  
21 involving Mr. Heaggan-Brown.

22 We at the time stopped the questioning  
23 of No. 18. We had a discussion in chambers. At  
24 that time we moved or had Your Honor make a  
25 determination about whether this panel should be

1 dismissed and a new panel employed given the  
2 potential taint that could have or may have  
3 occurred by the statement by Juror No. 18. That  
4 was made in chambers and the Court denied that  
5 request.

6 THE COURT: Correct. And just let me  
7 expand on the record a little bit. Is that --  
8 first of all, is that the understanding of the  
9 State?

10 MR. LINDSAY: That's correct. I think  
11 the specific statement by the juror was that he  
12 became aware of other cases in which  
13 Mr. Heaggan-Brown was involved.

14 THE COURT: Well, I don't even know if  
15 he went that far. He said other cases and I think  
16 it got cut off pretty close to that.

17 In any event, I know what the -- the  
18 intent and what he meant by that. It got cut off  
19 pretty quickly. The concern, you know, the Court  
20 had obviously was that this issue was to not be  
21 considered by the jury or the jury panel and we  
22 tried very hard to keep that from being known to  
23 the panel, and if it was, then we tried to root it  
24 out. I think it happened in such a quick fashion  
25 and the way it was worded in terms of cases was



1 somewhat middle of the road the way it was  
2 explained. Cases could mean cases of which he may  
3 be a defendant or cases in which he was involved  
4 as an officer, any number of things. And it kind  
5 of went so quickly that I don't think anyone  
6 really picked up on it, or if they did, they  
7 really didn't think twice about it.

8 The other thing that we have going for  
9 us with regard to this panel here is that this  
10 jury panel, in my estimation over the 3 to 400  
11 juries that I've had over the years, is a very  
12 good jury and a jury that would put things aside  
13 if instructed to do so and make a decision based  
14 only on the evidence. I can't guarantee that, but  
15 the feeling that the Court had was since this  
16 appeared to me to be somewhat de minimis, we could  
17 toss out the entire panel and start all over again  
18 but that wasn't going to guarantee that somebody  
19 else wasn't going to blurt something worse out,  
20 ended up we would never get a panel selected in  
21 this case.

22 So the long and the short of this is  
23 the Court believed that this issue was de minimis,  
24 it was not anything that would be prejudicial to  
25 the defendant -- or overly prejudicial to the

1           defendant and the Court denied the motion.

2                   MR. LINDSAY: Judge, the only other  
3           thing I would note, because I think the record  
4           would be silent, is that at the time that the  
5           question was asked, that juror had already been  
6           stipulated as a strike for cause based on the  
7           hardship question.

8                   THE COURT: Correct. He was no long --  
9           he was not going to be an active, participating  
10          juror anyways. The concern, obviously, was more  
11          that it was spoken out in front of the other  
12          jurors. But as I said, it was something that went  
13          so quickly and it was shut down so quickly and he  
14          was not allowed to expand on that that it was  
15          something in my mind that was de minimis and  
16          therefore did not require the drastic remedy that  
17          was requested.

18                   Anything else?

19                   MR. LINDSAY: No.

20                   MR. SMITH: No, sir.

21                   THE COURT: All right. Let me talk to  
22          the lawyers about scheduling for tomorrow for a  
23          few minutes, and then I need to talk to the  
24          deputies about tomorrow, and we do need to swear  
25          the afternoon deputies, the second shift deputies.

1           So that will be just the two of you?

2                   THE BAILIFF: Three.

3                   THE COURT: We have another one out  
4 here?

5                   THE BAILIFF: Yeah, there's three  
6 deputies. They're right inside.

7                   THE COURT: In addition to these guys  
8 or separate? The second shift guys are out there?

9                   THE BAILIFF: Yes.

10                  THE COURT: Got it. You should go get  
11 them. All right. There we go.

12                  THE CLERK: I'm going to swear you guys  
13 in.

14                   (The bailiffs were sworn in.)

15                  THE COURT: Great. Thank you.

16                  MR. KOHN: We are done with our client?

17                  THE COURT: Yes, we are finished with  
18 that today.

19                   Let me start with the sheriff's  
20 department since they need to make their  
21 arrangements, and then we can talk very briefly  
22 about tomorrow and then I think we're done for the  
23 evening.

24                   (Proceedings adjourned at 4:48 p.m.)  
25

1       STATE OF WISCONSIN       )  
2                                       ) ss.  
3       MILWAUKEE COUNTY       )  
4  
5

6                                       I, LAURELL L. BRESLOW-COLLIEN,  
7       Official Court Reporter in and for the Circuit Court of  
8       Milwaukee County, do hereby certify that the foregoing  
9       is a true and correct transcript of all the proceedings  
10      had in the above-entitled matter as the same are  
11      contained in my original machine shorthand notes on the  
12      said trial or proceedings.

13  
14      Dated at Milwaukee, Wisconsin on January 12, 2018.  
15  
16  
17  
18  
19

20      \_\_\_\_\_  
21      Electronically signed by:  
22      LAURELL L. BRESLOW-COLLIEN, RPR  
23      OFFICIAL COURT REPORTER  
24  
25